Supreme Court, U.S.
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No. 94-1066

In The

Supreme Court of the United States

October Term, 1994

FERRELLGAS, INC., and GILBERT CANDELARIA,

Petitioners,

v.

ROYCE CLAY and SHELLA SNIDER,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of New Mexico

BRIEF IN OPPOSITION

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QUESTIONS AS PRESENTED BY PETITIONERS

1. Whether the Due Process Clause of the Fourteenth Amendment prohibits the retroactive imposition of punitive damages for violation of a substantive standard of liability that was created by judicial decision subsequent to the conduct for which the punishment was imposed.

2. Whether the Due Process Clause prohibits the imposition of liability for punitive damages for nonintentional conduct that was, measured under common-law rules, merely negligent.

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BRIEF IN OPPOSITION

The Respondents respectfully request that the Petition for Writ of Certiorari prayed for by the Petitioners herein be denied for the reasons hereinafter set forth.

STATEMENT OF THE CASE

Respondents supplement and contradict the Petitioners' Statement of the Case as follows:

A. STATEMENT OF THE FACTS

The most conspicuous default in the Petitioners' presentation of the facts in this case is the curious failure to mention any of the omissions and violations of regulatory law which gave rise to the award of punitive damages. Significantly, the facts and circumstances which were neglected by the Petitioners are precisely those which influenced the Supreme Court of New Mexico to conclude that the acts of Ferrellgas and its employees in this case amounted to " . . . corporate indifference and reckless conduct." App. A, 14a. Respondents will summarize those facts herein.

Ferrellgas engages in the business of distributing propane and propane appliances. It also profits from converting fuel systems so that automobiles are made capable of running on propane. Since propane is highly flammable and can be extremely dangerous if mishandled, the State of New Mexico requires that commercial handlers and distributors such as Ferrellgas be licensed and be subject to safety regulations promulgated by the New Mexico LPG Bureau.

Ferrellgas undertook to convert Shella Snider's automobile to a propane fuel system, and for this purpose a propane tank was placed into the trunk of the car by Gilbert Candelaria. Regulations require that the tank be isolated from the passenger compartment and from any source of potential ignition. This must be accomplished

by installing a vapor barrier between the trunk and the passenger area *before* the tank is installed. App. A, 11a. This was not done by Gilbert Candelaria, nor was it done by any other Ferrellgas employee. *Id.* Regulations further require that the trunk of the automobile be vented to the outside *before* the tank is installed. *Id.* This also was not done. *Id.* Furthermore, the tank contained fuel as a result of being leak-tested by Gilbert Candelaria. This fuel was not purged from the tank. *Id.*

The automobile was released by the Ferrellgas manager, Gerald Schell, and he failed to warn that there was no vapor barrier. He likewise did not give warning that the trunk had not been vented to the outside. "Schell also did not check to see if the tank had been filled other than by opening a valve and smelling for gas. He did not ask Candelaria if propane had been placed in the tank nor did he make sure that the tank had been purged." App. A, 12a. Thus, he knew or should have known that the tank contained propane. *Id.* "Similarly, Candelaria believed that he was to complete the conversion and thus knew or should have known that the vehicle had been released. Despite this, he did nothing to retrieve the vehicle or to warn Snider . . . , even though he knew the risk of harm of releasing a vehicle in that unsafe condition. The net effect of these omissions was that Schell released a vehicle that was dangerously unsafe and in violation of state law." *Id.*

LPG Bureau regulations also require the licensee to file a Form 6 with the agency upon performance of any propane conversion or any partial conversion. The purpose of this requirement is to trigger an inspection by a state inspector to determine if the work is in compliance with the safety regulations. Ferrellgas never filed a Form

6 regarding the installation of the tank in Shella Snider's automobile. App. A, 5a. In fact, the evidence showed that Ferrellgas routinely failed to file any required Form 6 even though it had completed more than 100 tank installations, indicating " . . . that Ferrellgas did not care to have the state inspector's office double-check the work of its employees." App. A, 12a. Ferrellgas was not able to offer any explanation for its repeated violations of state law, and stipulated at trial that it participated in, authorized or ratified the acts of its employees with regard to the installation of the propane tank. App. A, 6a, n.1.

B. PROCEEDINGS BELOW

1. The Trial Court Proceedings

Respondents respectfully submit that Petitioners' statements regarding the post-trial motions are misleading and incomplete. Ferrellgas and Candelaria acknowledged to the trial court that punitive damages could be awarded upon a showing of recklessness or utter indifference and they simply argued the evidence. In response, the trial court found that there was sufficient evidence of recklessness and utter indifference. Additionally, Ferrellgas and Mr. Candelaria did not, as stated in the Petition, argue that they had been denied due process on the basis that punitive damages had been awarded for the mere negligence of Mr. Candelaria and Mr. Schell. They argued generally that punitive damages violated the Eighth Amendment to the United States Constitution and that punitive damages violate concepts of fundamental fairness. These arguments were properly rejected by the trial court.

2. The New Mexico Court of Appeals' Decision

It is simply a deception for Ferrellgas to state that it raised a federal due process "challenge" in the New Mexico Court of Appeals. The constitutionality of punitive damages was only mentioned in passing by Ferrellgas in a minor footnote contained in a supplemental brief. *See* Supp. Br., at 6, n.2. Therefore, contrary to the impression that Petitioners are now trying to convey to this Court, constitutional "challenges" were not presented on appeal in this case until after the Supreme Court of New Mexico decided against Ferrellgas on the common law and substantial evidence issues.

3. The New Mexico Supreme Court's Decision

While the New Mexico Court of Appeals felt that the punitive damage award was not supported by the evidence, the New Mexico Supreme Court disagreed and held that the punitive damage award was supported by substantial evidence. App. A, 8a. The New Mexico Supreme Court relied upon existing New Mexico precedent in stating the view that the conduct of the Ferrellgas employees, including that of its manager, Gerald Schell, has to be examined in light of the fact that they were dealing with a potentially dangerous substance. The New Mexico Supreme Court criticized its lower court for applying a Utah case to find to the contrary. App. A, 7a. In doing so, the New Mexico Supreme Court was careful to point out that recklessness is a touchstone for punitive damages, and was focusing on the nature of the product being handled. *Id.* The New Mexico Court of Appeals had

failed to recognize that a cavalier mishandling of a dangerous product by licensed professionals can amount to recklessness. *Id.*

The New Mexico Supreme Court further found that its lower court had been too restrictive in its view of the evidence and had failed to examine the conduct of the Ferrellgas employees, again including its manager, as a whole. The following language in that regard is contained in the New Mexico Supreme Court opinion:

> The case at bar, like *Horton*, provides a perfect example of why the acts of the employees should be viewed cumulatively to determine the mental state of a corporation. The Court of Appeals exonerated Ferrellgas from paying punitive damages because neither Candelaria nor Schell knew what the other was doing. 114 N.M at 338, 838 P.2d at 492. If we follow this analysis, Ferrellgas escapes liability because its employees failed to communicate with each other. The culpable mental state of the corporation, however, may be inferred from the very fact that one employee could be ignorant of the acts or omissions of other employees with potentially disastrous consequences. In this case Ferrellgas cannot be said to have been an innocent party; through its corporate policy (or lack thereof) it allowed Schell to be unaware of the conduct of Candelaria, and vice-versa, despite the fact that in all probability this ignorance would result in severe harm. App. A, 11a.

The New Mexico Supreme Court emphasized that the evidence supports the conclusion that Ferrellgas' corporate policies and procedures permitted its employees to engage in reckless conduct when it also said:

> Further, Ferrellgas allowed its employees to violate state law by mounting propane tanks before installing the vapor barrier and proper venting and authorized or participated in Schell's continuing failure to file the proper forms which, had they been filed, probably would have prevented the harm to Snider and Clay. Given the high risk of harm that accompanies the handling of propane gas, the negligence of Schell and Candelaria and regular violation of safety regulations by Ferrellgas amounts to corporate indifference and reckless conduct. *C.f., Horton,* 690 S.W.2d at 387-88. App. A, 14a.

In summary, therefore, the New Mexico Supreme Court simply reversed its lower court on issues involving the proper analysis and determination of substantial evidence.

REASONS FOR DENYING THE WRIT

The New Mexico Supreme Court did not adopt or apply any new or unique theory of liability in this case. Instead, it relied upon existing precedent and a review of the evidence to conclude that the jury's award of punitive damages was proper. Furthermore, contrary to Petitioners' gross mischaracterizations, the New Mexico Supreme Court was careful to state that punitive damages cannot be awarded for merely negligent conduct. The Supreme Court of New Mexico found substantial evidence that Ferrellgas employees were reckless and that Ferrellgas itself demonstrated a cavalier and indifferent corporate attitude toward safety.

There simply is no constitutional issue in this case, and no federal or constitutional question was raised in the New Mexico Supreme Court's opinion.

ARGUMENT

When the Petition in this case is compared with the actual written opinion of the Supreme Court of New Mexico, and when all proper facts are considered, it is apparent that the Petitioners have designed their Questions Presented in an attempt to embellish and decorate what is in fact a state law case involving only sufficiency of the evidence issues. In short, this case does not present "special and important" questions for review. *See* Rules of the Supreme Court of the United States, Rule 10.

This case has been tried to a jury upon instructions which required proof of recklessness for an award of punitive damages. App. A, 8a. The New Mexico jury instructions define "reckless" as "the intentional doing of an act with utter indifference to the consequences." *Id.* The jury, trial judge and Supreme Court of New Mexico all found that there was sufficient evidence of such utter indifference in this case, and no one can seriously quarrel with the deterrence of cavalier and reckless conduct in the handling of a potentially dangerous product and of the "regular violation of safety regulations." App. A, 14a.

Rather than focusing on the historical development of punitive damages in the federal courts, as Petitioners do, this Court's attention should be directed to New Mexico's state court development of punitive damages. *See Molzof v. United States*, 502 U.S. 301, 112 S.Ct. 711,

715-17 (1992). The New Mexico Supreme Court's decision in this matter is consistent with and supported by prior New Mexico case law, and punitive damages may be awarded in New Mexico when the conduct of the wrongdoer is maliciously intentional, fraudulent, oppressive or committed recklessly or with a wanton disregard of the plaintiff's rights. *See Loucks v. Albuquerque National Bank*, 76 N.M. 735, 747, 418 P.2d 191 (1966). In the present case, the New Mexico Supreme Court reiterated and applied this standard in its review of the evidence. App. A, 7a.

In reaching the conclusion that there was sufficient evidence to support a finding that Ferrellgas and its employees were reckless, the New Mexico Supreme Court pointed out the extreme risk inherent in the type of work undertaken by Ferrellgas and the dangerous condition the automobile was in when it left Petitioners' control. The extreme risk of danger increased the Petitioners' duty of care. Specifically, the Supreme Court stated as follows:

> Thus, as the risk of danger increases, conduct that amounts to a breach of duty is more likely to demonstrate a culpable mental state. The circumstances define the conduct; a cavalier attitude toward the lawful management of a dangerous product may raise the wrongdoer's level of conduct to recklessness, whereas a cavalier attitude toward the lawful management of a nondangerous product may be mere negligence. In measuring punitive damages "the enormity and nature of the wrong" must be assessed. *Green Tree Acceptance, Inc. v. Layton*, 108 N.M. 171, 174, 769 P.2d 84, 87 (1989). We believe this is what the trial court had in mind when it indicated that the conduct of Ferrellgas rose to a

level of recklessness because of the dangerousness of the product. App. A, 7a.

In an attempt to manufacture a due process issue, Petitioners argue that the New Mexico Supreme Court announced unprecedented law when it viewed the acts of the Ferrellgas employees in a cumulative way, instead of isolating each reckless act for analysis. Petitioners are incorrect. The precedent in New Mexico amply demonstrates the appropriateness of viewing Petitioners' acts cumulatively, and it is important to note that Ferrellgas stipulated at trial that all of the acts of its employees were authorized by Ferrellgas. App. A, 6a. This stipulation eliminated any argument by the Petitioners that it should not be held accountable for the wrongful conduct of its employees. Given this stipulation at trial, the acts of its employees were the acts of Ferrellgas, and it only makes sense, therefore, to analyze those acts and omissions in a cumulative way.

The New Mexico courts adopted a standard of review for punitive damages awards which called for a cumulative evaluation of all the circumstances long before the occurrence of the events in this case. For example, in *Gray v. Esslinger,* 46 N.M. 421, 130 P.2d 24 (1942), the New Mexico Supreme Court noted that the defendant's violation of a traffic statute was a circumstance to be considered along with all of the other evidence in determining whether there was sufficient conduct to warrant an award of punitive damages. This evaluation of evidence in aggregate was reaffirmed by the New Mexico Court of Appeals in *Sutherlin v. Fenenga,* 111 N.M. 767, 810 P.2d 353 (Ct.App. 1991), and *DeMatteo v. Simon,* 112 N.M. 112, 812 P.2d 361 (Ct.App. 1991). In both cases, the appellate court

took care to reflect the numerous acts committed by the respective defendants, and concluded that all the acts, viewed collectively, supported the award of punitive damages. The New Mexico Supreme Court engaged in the same analysis in the present case, viewing all of the acts of Ferrellgas' employees in the context of the level of risk or prospect of harm attendant to the circumstances. The New Mexico Supreme Court properly applied existing legal standards, and the Petitioners' due process rights have not been violated. Petitioners, as licensed handlers of a dangerous product, were aware that a failure to follow safety regulations could result in severe harm. They knew that a vapor barrier and external venting were required by regulation and they knew of the Form 6 filing requirement. App. A, 4a. They knowingly did not comply with the safety regulations. App. A, 11a. It is ludicrous for Petitioners to argue that they had no notice that this reckless conduct could result in an award of punitive damages.

Punitive damage issues, particularly those involving sufficiency of the evidence, are state common law concerns. *See Molzof v. United States, supra.* It is ill-advised to take the matter of punitive damages and decorate the common law as if due process were at issue. *See TXO Production Corp v. Alliance Resources Corp,* ___ U.S. ___, 113 S.Ct. 2711, 2728 (1993) (Scalia, J., concurring in judgment). In fact, even the Petitioners did not brief or argue constitutional issues in this case on appeal[1] until they had lost all the common law and evidentiary issues in the Supreme Court of New Mexico.

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[1] Except for the single footnote previously mentioned.

CONCLUSION

This Court should deny certiorari since this case does not involve any constitutional issues nor any special or important question for review.

Respectfully submitted,

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